No. 72-1570

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT H. DONNELLY,

Petitioner,

vs.

BENJAMIN A. DeCHRISTOFORO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT
and
BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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May it please the Court:

The National Association of Criminal Defense Lawyers respectfully moves this Court for leave to file a brief *amicus curiae* in support of the Respondent in the captioned case. This motion is made pursuant to this Court's Rule 42. Respondent has consented to our filing; Petitioner has declined to consent to our participation. The interest of movant and a statement of our reasons for desiring to file a brief as *amicus curiae* are set forth below.

Interest of Movant

The National Association of Criminal Defense Lawyers is composed of more than one thousand lawyers who are actively engaged in the practice of criminal law in at least forty-four States, in Puerto Rico, in the Virgin Islands and in the District of Columbia. The daily practice of their profession involves every stage and facet of the entire process of criminal justice in both State and Federal Courts. The discharge of their responsibility to the judicial system and to their clients has imparted to them a special sensitivity to the fact that preservation of an orderly society is largely dependent upon adherence to a high standard of professional responsibility and basic fairness in criminal litigation. They are convinced that an undeviating insistence upon maintenance of such standards on the part of both prosecution and defense will best serve the interests of the judicial system and of the society whose preservation is dependent upon that system.

It is the position of the Association that the Fourteenth Amendment mandates compliance by the States with the essentials of the Sixth Amendment Confrontation Clause.

The Association further believes that any meaningful false statement by a prosecutor to a jury, especially if wilfully made, must be viewed as a denial of due process.

The Association is further persuaded that the highest degree of professional responsibility must attend any presentation to a court of review. Any misrepresentation as to the recitations of the record creates an irrelevant collateral problem, the necessity for whose resolution necessarily dilutes the resources of the party thus impacted and diverts the Court from consideration of cases of other liti-

gants. Such misconduct occurs only in the calm and deliberate atmosphere of the brief-writing facility, and accordingly represents a completely inexcusable failure of professional responsibility. The members of the Association encounter this problem with sufficient frequency to warrant the hope that a forceful expression by this Court may tend to decrease the incidence of such activity.

Movant's Reasons for Desiring to File Brief as Amicus in the Case at Bar

Petitioner's Brief attacks every aspect of the judgment below. Respondent's counsel is professionally obligated to approach this case in the manner best calculated to protect the interests of Respondent as manifested by the special circumstances of the record before your Honors for review. Movant is deeply concerned that in these circumstances, the judgment below may be sustained on narrow grounds which might, in future cases, be cited contrary to the Court's intention as indicating a tolerance in circumstances less compelling than those here presented, for dilution of the principles above expressed.

Those principles are peculiarly vulnerable to erosion. Movant's member-lawyers view any challenge to those concepts as a matter of the gravest concern. Accordingly, at a meeting of Movant's Board of Directors on December 8, 1973, a resolution was adopted authorizing an application to this Court for leave to submit an *amicus* brief in this case.

Movant supports the position of the Respondent that the judgment below should not be disturbed. We further suggest that reconsideration of the order granting certiorari may be warranted by the special circumstances of this case.

Movant desires to present to your Honors the brief here appended, expressing its view that important considerations of broad public interest, threatening the basic concepts of due process, are involved in these proceedings.

Movant accordingly prays leave to file its brief appended hereto.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Our interest is as set forth within the foregoing motion for leave to file this brief as *amicus curiae.*

STATEMENT OF THE CASE

Respondent and a co-defendant were on trial in a State court charged with murder in the first degree. At the conclusion of the evidence, the co-defendant pleaded guilty to murder in the second degree (A. 98). The jury was in-

formed of the fact of the plea, but was not told that the charge had been reduced (A. 99).

The prosecutor's subsequent closing argument advised the jury that the offense was "in our judgment . . . one of the most savage killings that any jury could ever see anywhere under any circumstances." (A. 120) In the absence of any evidence that Respondent had possessed any of the guns found in the murder vehicle, he said that "You and I know that (it is) a myth" that all the guns had been carried by the other people then present (A. 124). Toward the end of his argument, he told the jury: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way." (A. 130).

The most seriously challenged remark was:

> "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." (A. 129)

In the Court of Appeals, the prosecution argued that this remark "was directed to revealing apparent defense tactics." (State's Brief in Court of Appeals, p. 25) However, it was subsequently conceded that Respondent had never negotiated with the prosecution for acceptance of a plea to a lesser charge (A. 235, 241); and the prosecution has argued in this Court that "it makes no sense" to suggest that any such offer would not have been accepted by the prosecution. (Petition for Certiorari, p. 25; Petitioner's Brief, p. 24).

Respondent objected to the statement. The ruling on that objection is unclear (Cf. A. 155). The trial judge first stated "I don't think—" and then said "No" (perhaps

with other inaudible remarks), (A. 129, 133). The Supreme Judicial Court of Massachusetts "interpret(ed)" that statement "as agreement with defense counsel. . . ." (R. 155); on the other hand, the trial judge previously used the word "No" to overrule an objection. (A. 61)

On the conclusion of the prosecutor's argument, the trial was recessed for the day. Immediately upon its reconvening, Respondent moved for mistrial, citing the remarks above quoted (A. 132-133). The motion was denied (A. 134). The trial judge stated that "before the charge" (A. 134) he would give "such (curative) instructions to the jury in this regard as you wish me to" (A. 134). Counsel for respondent asked that the jury be told that the remark was improper, and that Respondent had always "maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense." The judge replied "I will do so" (A. 135). However, that was never done.

The judge suggested that defense counsel write out the precise curative instruction desired (A. 135). Respondent thereupon filed the specific written request quoted in full at pages 12 and 13 of the Petition for Certiorari. (A. 145) However, that charge was not given. (A. 144) Instead, as a part of the general charge, the jury was instructed that arguments for neither side were to be regarded as evidence; that with regard to the challenged statement, "There is no evidence of that whatsoever, of course"; that the statement should be disregarded; and that the same applied to misstatements "if any" which may have been made by counsel for Respondent. (A. 143-144)

Petitioner was convicted of murder in the first degree, with a recommendation against capital punishment. Sentence was imposed accordingly. The Supreme Judicial Court of Massachusetts affirmed (A. 149) over a two-judge dissent (A. 162, 170). Respondent then sought habeas corpus in the United States District Court for the District of Massachusetts. The magistrate recommended that the writ be granted (A. 186-195). The District Judge overruled that recommendation and denied the petition (A. 231-232). The United States Court of Appeals for the First Circuit reversed the District Court judgment (A. 236), one judge dissenting (A. 243). This Court then granted the State's Petition for Certiorari.

SUMMARY OF ARGUMENT

The prosecutor suggested to the jury that the Respondent desired to plead guilty to a lesser charge, but that the prosecutor was unwilling to agree. That suggestion was false in both aspects, and the prosecutor was aware of its falsity. Since it related to matter which was obviously within the direct personal knowledge of the prosecutor, the jury could not have considered it a mere statement of opinion. However, even viewed as an expression of opinion it constituted a wilful falsity, since the prosecutor confessed to having held the contrary opinion to that which he articulated. The verdict reflects adoption of the prosecutor's view by the jury.

Any statement by a prosecutor which is wilfully false and is material to the issue before the jury, constitutes a denial of due process of law. Such statements also deprive the defendant of the right of confrontation. That is particularly true when the statement is made in the course of the prosecutor's final argument, to which the defendant has no chance to reply.

However, it is not every such denial which will avoid a conviction. If the jury is informed of the falsity of the assertion, due process is assured; and the denial of confrontation becomes irrelevant, since the defendant thereby achieves everything that confrontation could have accomplished in his behalf.

The Petition for Certiorari tended to indicate that such instruction had been given to the jury. However, no such instruction was given. Instead, the jury were merely told to disregard that argument because it was not based on evidence. The intimation thus imparted to the jury was that the challenged statement may have been true, but was incompetent. Such an instruction cannot cure the constitutional denials resulting from the falsity of the prosecutor's assertion.

Principles of comity and deference to State determinations are inapplicable to this case. The State adjudication simply did not face the federal constitutional issue. It treated the problem as one of improper statement of a prosecutor's personal belief, and ignored the implications of the falsity of the prosecutor's assertion. The federal constitutional problems were faced only by the Court of Appeals, and were properly resolved there.

Nothing done by defense counsel justifies the falsehood uttered by the prosecutor. Moreover, no possible provocation could excuse the utterance of a deliberate falsehood.

ARGUMENT

I.

The prosecutor's statement that defendant's objective was a lessening of the degree of guilt and punishment rather than an acquittal, was a wilfully false and material assertion of fact.

To treat the prosecutor's statement as mere procedural error is to open constitutional floodgates.

The statement was not only clearly irrelevant and prejudicial; it was demonstrably false. As we shall show, the prosecutor knew it was false. It related to a matter which the jury must have known to be within the personal knowledge of the prosecutor. A determination of its constitutional acceptability will sweep almost four decades of unbroken principle into dust, give license to opportunism and effectively destroy a cherished value of our society.

Respondent was a passenger in an automobile containing three other persons. One of them was shot and killed. The prosecution conceded that the shooting was done by the other two in the car, and not by the Respondent (A. 123, Pet'n for Cert. p. 25).

Both of the men who fired the shots were permitted to plead guilty to murder in the second degree (A. 150), one of them during his joint trial with the Respondent (A. 98). The prosecution has argued to your Honors that "it makes not a whit of sense" to doubt that the Respondent could have had the same concession for the asking. (Pet'n for Cert. p. 25)

Respondent made no such request, entertained no such offer, and insisted upon a jury determination of his guilt. (A. 235)

Knowing all those facts, the prosecutor told the jury:

> "I don't know what they (Respondent) want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." (A. 129)

The jury took him at his word. They found Respondent guilty of "something a little less than first-degree murder": first degree murder with a recommendation against imposition of the death penalty.

It is completely understandable that the jury would accept the prosecutor's statement. Only three people would necessarily know whether the Respondent had attempted to negotiate a plea: Respondent, his attorney and the prosecutor. Respondent and his attorney said nothing about that issue. The prosecutor did, and stood uncontradicted because he had the last word.

But the word was a falsity, and he knew it to be such. He did not "quite frankly think" that the Respondent wanted to be found guilty of "something a little less than first degree murder." Instead, he *knew* that the Respondent could have that for the asking; that the Respondent was aware that he could have it; and that Respondent had made no such request.

In short, the prosecutor *knew* that Respondent's objective was *not* a mere diminution of the charge, and that his contrary suggestion to the jury was a falsehood.

When matter is within the personal knowledge of the speaker, the qualifying phrase "I think" will not convert a falsehood into a possible truth, or a factual statement into an opinion. It will not even mitigate a perjury charge if the declaration is made under oath. The prosecutor's

statement cannot be treated as a mere expression of opinion by this Court, because he was speaking of a factual proposition concerning which he possessed direct personal knowledge. For that same reason, the jury must have treated it as a factual assertion.

The completely cynical quality of the prosecutor's position is apparent from his presentation in the Court of Appeals. In that Court, he argued that his "remark was directed to revealing apparent defense tactics." (State brief in Court of Appeals, p. 25) The only possible beneficiary of such relevations was the jury. The quoted brief was filed before that Court made the inquiry which elicited the fact that the "apparent defense tactic" had been imaginary. (A. 241, 235) It was only following that development, that the attempt to "reveal" to the jury the "apparent defense tactics" was converted into a mere expression of the prosecutor's opinion. (Cf. Pet'n for Cert. p. 16; Petitioner's Brief p. 23)

But the prosecutor could not have held even a bona fide opinion supporting the challenged assertion, because he *knew* that if a lesser charge had been Respondent's objective, Respondent had only to ask.

Thus, the prosecutor's assertion is a clear falsehood.

The prosecutor now argues that the jury could not possibly have believed his revelation as to "apparent defense tactics." Completely reversing his field in the light of the additional facts elicited by the Court of Appeals, he contends that his disclosure of the apparent was obviously incredible on its face:

> "It makes not a whit of sense to accept a plea of guilty from a co-defendant who had shot the victim and refuse a plea from another defendant who admittedly did not shoot the victim." (Petition for Certiorari, page 25; accord, Brief for Petitioner, page 24)

But it makes a great deal of sense indeed to accept a plea from a simple triggerman, while refusing a plea from the architect of the murder plan.

And it was exactly that concept, completely inconsistent with the prosecutor's presentation in this Court, which he argued to the jury at the trial:

> "And he (Respondent), more than anybody else, I think, *is more reprehensible than the other two combined,* because this was the man who supposedly was the friend of Joseph Lanzi (the victim). He is, in fact, a traitor to his friends. He is a murderer of his friend—pure and simple." (A. 131, emphasis added)

Having explained to the jury the supposed basis for the prosecution's special harshness toward Respondent, who was then pictured as "more reprehensible than the other two combined," the prosecution now argues to this Court that its assertions were harmless because Respondent was obviously less culpable than either of the others.

In that posture, the Petitioner apparently feels free to contend:

> "(T)here is absolutely nothing in the instant record to support the inference that the prosecutor deliberately or willfully misrepresented what he knew not to be true." (Brief for Petitioner, page 22)

The facts disclosed by this record will impart to that assertion such force as your Honors may deem it to have.

• • •

We have pursued at some length a demonstration of the falsity of the prosecutor's statements, because of the paramount importance of that proposition. The Court of Appeals awarded relief to Respondent because of that falsity (A. 241-242). To excuse that falsity would diminish a cherished value of professional responsibility, and place

a premium upon successful explorations of the boundaries of due process. It would cast a dark shadow over the doctrine of *Brady* v. *Maryland* (1963), 373 U.S. 83. It would impair the pride and confidence of every citizen. And its message to the cynical and to the opportunistic would be one of encouragement.

II.

Considerations of comity and federalism are inapplicable to this case, because the State Court declined to pursue the federal constitutional implications of the prosecutor's false statement.

The Petitioner (prosecution) apparently views this case as presenting only the question whether an expression of the prosecutor's personal belief constitutes a denial of due process. The Petition for Certiorari suggested that this was a case in which a technically improper argument, fully rectified by curative instructions, had been elevated artificially to the level of fundamental unfairness, thereby violating principles of comity and federalism. Petitioner's brief pursues the same approach, urging that only a matter of State procedure is involved "against a Due Process backdrop." (p. 18) Although the Court of Appeals agreed with the State court that a personal expression of the prosecutor's belief in a defendant's guilt is not a denial of due process (A. 238), the Petitioner flogs that dead horse mercilessly, while giving only the most fleeting attention to the true basis of the opinion below: "Affirmative falsity" of the prosecutor's statements. (A. 242) The main thrust of Petitioner's argument (Brief, pp. 24-30) is dedicated to the proposition that the Court of Appeals' application of the principle of *Brady* v. *Maryland* amounted to nothing more than "imposing federally preferred procedural rules upon state tribunals." (Brief, p. 25)

Brady enunciates something far transcending any consideration of procedure. It expresses the bedrock of constitutional safeguard in state proceedings. It is the most significant single civilizing influence in criminal jurisprudence. Never before has it been suggested that the conceded right of the states to experiment in the administration of criminal justice extends across the borders of *Brady*.

Nevertheless, the Petitioner has suggested that the propriety of the trial proceedings should be resolved "in terms of sheer numbers." Including the trial judge, eight judges have held that Respondent received a fair trial; only four have held that he did not. Respondent therefore loses, 8 to 4. (Pet'n for Cert., p. 25)

That death blow to the whole theory of appellate jurisprudence omits consideration of one important factor: The Court of Appeals was considering an issue which the State judiciary had declined to pursue (A. 241). That issue was the effect of the falsity of the prosecutor's statement to the jury.

Although from the very outset the Respondent expressed more concern with the falsity of the prosecutor's statement than with the procedural problem of the expression of the prosecutor's "opinion" as such (A. 129, 135, 145), the Massachusetts Court considered only the latter proposition (A. 154-155).

It was only the Court of Appeals which thought it necessary to pass upon Respondent's contention that he had been denied due process by reason of the false statement made to the jury. (A. 241-243)

To adopt Petitioner's system of adjudication, Respondent wins on that point, 2 to 1. . . .

Comity and federalism do not and cannot even theoretically require deference to a State action which *ignores* a federal constitutional claim. Such action would be abdication rather than federalism. If the fact that a State court "declined to pursue" (A. 241) a federally-based claim can foreclose inquiry on federal habeas corpus, then the entire spectrum of federal rights becomes unenforceable in state proceedings.

III.

Any deliberately false and material statement by a prosecutor is a denial of due process.

We have stated our proposition in modest terms.

The Court of Appeals noted (A. 242) that *Brady* v. *Maryland* (1963), 373 U.S. 83, denounces suppression of exculpatory evidence as a denial of due process "irrespective of the good faith or bad faith of the prosecution." The court below construed suppression of favorable evidence "pari passu with affirmative falsity" (A. 242).

It would indeed be anomalous to hold that the due process clause forbids a State prosecutor from suppressing exculpatory evidence, but does not prevent him from sponsoring or uttering outright falsehoods.

Nobody could doubt the materiality of the prosecutor's statement. It was, of course, completely incompetent, even if it had been truthful and offered by a witness subject to procedural safeguards. But it was material, in that it bore very directly upon the Respondent's guilt. Was he such small fry that others were willing to commit murder in contemptuous disregard of his presence, or so major a criminal actor that the prosecution would refuse him the

clemency extended to the actual triggermen? Did he consider himself to be guilty of the charge? The prosecutor's comment answered both questions, falsely.

In terms of due process, this case is on no different footing from that which it would occupy if the prosecutor had corruptly hired a witness to take the stand and testify falsely that Respondent had tried to plead guilty to a lesser charge but had been rebuffed. (In terms of the right of confrontation, that course would have been a lesser invasion of Respondent's rights; he would at least have been able to cross-examine the witness.)

This Court has made it clear that the format of a constitutional violation and the device by which it is accomplished are irrelevant. *Douglas* v. *Alabama* (1964), 380 U.S. 415. This Court has also stated that the Fourteenth Amendment will not "tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller* v. *Pate* (1967), 386 U.S. 1.

To hold that a prosecutor may not knowingly introduce false evidence under formal procedural safeguards, but may utter deliberate falsities in argument where the defendant has no right of confrontation or response, would be to create a distinction which is logically insupportable.

If the concept of due process will tolerate a distinction among deliberate falsehoods, we would urge that the prosecutor's personal comments are more likely to be believed by a jury, and are therefore more noxious than those which he presents from the witness stand.

IV.

A deliberate falsehood need not result in mistrial or reversal. However, a curative instruction in such a situation is ineffective unless it advises the jury of the falsity of the assertion.

The Petitioner has argued vigorously that the trial court's instruction to "consider the case as though no such statement was made" (A. 144) removed any prejudice resulting from the challenged remark. (Petition for Certiorari, pp. 21-22) Petitioner urges that "in analyzing the effect of the prosecutor's remarks, particular stress must be placed upon the trial judge's curative instructions . . . ." (Pet'n for Cert., p. 21)

Petitioner stops short of drawing explicitly the conclusion necessarily derived from that proposition: A deliberately false statement is constitutionally acceptable if the jury is given routine instructions to disregard those comments.

An instruction designed to obviate the denial of a federal constitutional right should render that denial harmless beyond a reasonable doubt. *Chapman* v. *California* (1967), 386 U.S. 18, 24.

This Court has taken a realistic view of the "unmitigated fiction" that a routine instruction to disregard or limit consideration of evidence is sufficient to remove the prejudicial effect of dramatic and incompetent matter. *Bruton* v. *United States* (1968), 391 U.S. 123; *Jackson* v. *Denno* (1964), 378 U.S. 368.

The vice of the prosecutor's comment, as recognized by Respondent's challenge (A. 135), was its falsity. The trial judge at first agreed to instruct the jury that the assertion was untrue (A. 135), and Respondent formally requested

such action (A. 145). However, the instruction went no further than to tell the jury that they should consider only the sworn evidence in the case; that lawyers' arguments on both sides were not evidence (A. 143); and that they should disregard the prosecutor's statement that Respondent desired a guilty finding on a lesser charge because "there is no evidence of that whatsoever, of course." (A. 144)

In telling the jury to disregard the comment because the prosecutor had not made formal proof of what he had said, the trial judge certainly did not obviate the prejudice engendered by the prosecutor's falsehood. To the contrary, he may well have reinforced the prosecutor's credibility, although without so intending. The judge, who in the jury's view might well have had knowledge of Respondent's supposed attempt to negotiate a plea, told the jury to disregard the statement because no witness had testified to the matter. Presumably, it was irrelevant and objectionable, rather than untrue; if it had been untrue, a juror might logically expect the judge to say so in that situation.

The false proposition was never refuted in the presence of the jury, nor did any opportunity for such refutation exist except through the instruction which was first promised and then withheld.

We believe that a curative instruction can be effective to remove the adverse effect of deliberate misrepresentation. However, such an instruction cannot cure the falsehood unless it informs the jury that the challenged assertion was false.

Apparently, Petitioner agrees. Petitioner very properly emphasizes the importance of curative instructions (Pet'n for Cert., p. 21). Perhaps for the purpose of showing your Honors what should have been done, the Petitioner *quoted in full,* at pages 12 and 13 of the Petition for Certiorari,

the jury instruction tendered by Respondent and *refused* by the trial judge. (A. 145) After fully reciting this *refused* instruction, the Petitioner continued: "Immediately prior to the giving of the charge. . . ." (Pet'n for Cert., p. 13) The juxtaposition of the refused instruction with "the giving of the charge" might well have caused this Court to believe that Respondent's proffered curative instruction had been given. We think it very important that your Honors should know that this instruction was *not* given. Had it been given, the jury would have been advised of the falsity of the prosecutor's representation. In that circumstance, this *amicus* believes that the falsity would not have amounted to a denial of due process.

We do not consider it necessary that we comment further on the presentation made at pages 12 and 13 of the Petition for Certiorari, other than to characterize it as unfortunate.

V.

Any assertion of fact made to a jury of a criminal case, is subject to the Sixth Amendment right of confrontation. A statement by a prosecutor in his summation which recites a proposition of fact not shown by the evidence is a denial of that right.

The Court of Appeals properly concluded that "the prosecutor, in effect, testif(ied)" against Respondent (A. 243).

As a witness, the prosecutor enjoyed a unique privilege: He was neither cross-examined nor rebutted. Respondent had no right to ask him questions, and no right to respond to him in any manner; for the prosecutor was then exercising his privilege to have the last word.

In a criminal case, the prosecutor always has the last word. He is given that right because he has the burden of proof.

But that burden is a light one indeed, if proof can be introduced through the device of summation. For with respect to such "proof" a defendant has no greater right of confrontation than that possessed by any spectator.

The Sixth Amendment right of confrontation applies in State criminal proceedings. *Pointer* v. *Texas* (1965), 380 U.S. 400. It extends not only to testimonial presentations, but to any information received by the jury from the prosecutor or any other source. *Douglas* v. *Alabama* (1965), 380 U.S. 415; *Parker* v. *Gladden* (1966), 385 U.S. 363.

Implicit in that right is the privilege to cross examine any person who directly provides the information to the jury. *Chambers* v. *Mississippi* (1973), 410 U.S. 284, 295. That right would have been of special value in this case, since its exercise would probably have demonstrated the total falsity of the fact thus asserted. The assertion here challenged bore none of the "indicia of reliability" such as were found to justify relaxation of the confrontation standard in *Dutton* v. *Evans* (1970), 400 U.S. 74, 89. To the contrary, the petitioner now concedes that the assertion was completely unreliable.

Whatever may be the present reach of the confrontation clause in State proceedings, it clearly encompasses the denial demonstrated by this record. Accordingly, this case furnishes no appropriate vehicle for considering whether denial of confrontation constitutes grounds for collateral attack in a less noxious context.

VI.

On the record of this case, it is unnecessary to determine whether defense provocation can justify prosecutive misrepresentations. However, we would urge that there is no conceivable defense tactic to which a prosecution may appropriately respond by use of falsehood.

Petitioner seeks to excuse the foregoing state of affairs by pointing to "a provocative argument by defense counsel." (Brief, p. 19) Even if defense argument can be said to justify deliberate prosecutive misconduct—and we know of no such suggestion in any prior decision—the defense argument in this case furnishes no arguable excuse for retaliatory dishonesty. Any contrary holding would tend strongly to chill all reasonable argument of inferences on behalf of a defendant, through fear of providing a pretext for the type of false statements which the Petitioner seeks to defend.

Petitioner reprints (Brief, pp. 8-9) those portions of the argument by Respondent's counsel which he believes to have "provoked" the prosecutor into falsehood. (Accord, *Pet'n for Cert.* p. 18) They amount to nothing more than:

(a) A completely proper argument that the jury should infer, from proven circumstances, that Respondent's flight was motivated by fear rather than by consciousness of guilt. (The Massachusetts court not only found no impropriety in that argument, but deemed it to have a curative effect with respect to any possible claim of deficiency in the trial court's instructions on that issue, A. 158)

(b) A completely proper argument that there had been no showing of ill-will between Respondent and the victim. (At page 18 of the Petition for Certiorari, the Petitioner contends that this comment specifi-

cally "precipitated" the totally unrelated statement by the prosecutor that Respondent's objective was to be convicted of a lesser charge than first-degree murder!)

(c) An argument that Respondent had not fired a gun. That argument was so well-founded in the evidence that the prosecutor conceded it to be correct (A. 123).

(d) A statement that "I believe . . . I represent and argue to you" that there is a doubt as to Respondent's guilt.

If those arguments justify a false statement by the prosecutor, then it is hard to imagine any argument that would not. We ask that this Court reject that contention as specious. We urge that no conceivable act of misconduct can justify deliberate falsehood as retaliation. If this Court should not agree, we confidently urge that justification should not be found unless the provocation surpasses by several orders of magnitude the weak excuses presented here.

Petitioner also suggests that the prosecutor's statement might be justified by the *opening* statement of Respondent's counsel. (Brief, p. 6) If that were so, it would represent a reaction sufficiently delayed to deprive the prosecutor's claimed retaliatory instinct of all claim to spontaneity. But there is no showing of impropriety in that opening statement. It dealt with nothing more than permissive inferences from evidence actually introduced (R. 67, 72, 85-86, 88, 91, 96); with evidence actually offered and excluded by the prosecutor's objection during the testimony of Respondent's grandmother (Tr. 804-806); and with the statement actually made to the jury by Respondent (R. 140-142). (Whatever the status of that statement, it was properly offered for the jury's consideration.)

Finally, Petitioner suggests that his misconduct should be overlooked because "No specific curative objection was requested immediately. . . . Rather, *on the following morning* . . . counsel moved for a mistrial . . ." (Brief, p. 11, italics copied). But in terms of court time, the motion was made only seconds after the completion of the prosecutor's argument. Court adjourned for the day immediately on conclusion of the prosecutor's argument, and the motion for mistrial was made as soon as it reconvened. (R. 131-132; Tr. 914-918) The trial judge stated that he would have denied a motion for mistrial if one had been made immediately (R. 133). He expressly limited his curative instruction to the lack of evidenciary relevancy of the prosecutor's comment (A. 144), and refused a timely tender of a proper curative instruction demonstrating the falsity of that disguised testimony (A. 145). In these circumstances, there is no legitimate state interest in denying Respondent relief because of a lack of timeliness of his objection. *Henry* v. *Mississippi* (1965), 379 U.S. 443, 447. The Massachusetts Court treated Respondent's objections as timely and considered them on the merits (R. 154-156). The suggestion that Respondent should be denied relief for lack of timeliness in objecting is completely untenable, and is only that of the Petitioner, not the Massachusetts judiciary.

If the claimed provocation relied on in this case is deemed sufficient justification for prosecutive dishonesty, there will be no effective redress from such improprieties. For in the record of almost any criminal case a stronger "provocation" than is here claimed to exist can be found and used after the fact as an excuse for any prosecutive misconduct which might have occurred.

CONCLUSION

"Society wins not only when the guilty are convicted but when criminal trials are fair." *Brady* v. *Maryland* (1962), 373 U.S. 83, 87. Conversely, society is threatened with a serious loss if the position of the Petitioner were to be accepted in any degree. To do so would imperil the basic integrity of the adjudicative process, with an inevitable consequent diminution of the public respect for that process.

It has been some seven years since this Court stated:

> "More than thirty years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U.S. 103. There has been no deviation from that established principle. There can be no retreat from that principle here." (Miller v. Pate, 1967, 386 U.S. 1)

The record of this cause amply demonstrates that this most salutary principle still merits and requires this Court's vigilant attention.

Respectfully submitted,

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